NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN PURIFOY

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Fifth Circuit has held that an appellate court does not have the jurisdiction to review the denial of a downward departure where the government has filed a "substantial assistance" motion for downward departure under Sentencing Guidelines § 5K1.1. Do the courts of appeal have the jurisdiction under *Booker*[1] to review a district court's denial of a motion for downward departure under 5K1.1?

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[1]*United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

PARTIES TO THE PROCEEDINGS

John Purifoy is the Petitioner, who was the defendant-appellant below. The United States of America is the Respondent, who was the plaintiff-appellee below.

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Petitioner, John Purifoy, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. John Purifoy*, 788 Fed. Appx. 291 (5th Cir. 2019) (unpublished), and is provided in the Appendix to the Petition. [Appendix A]. The judgment of conviction and sentence was entered March 1, 2019 and is also provided in the Appendix to the Petition. [Appendix B].

JURISDICTIONAL STATEMENT

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit were filed on December 18, 2019. [Appendix A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Proceedings Below

On November 8, 2018, Defendant-Appellant John Purifoy ("Mr. Purifoy" or "Appellant") was charged by information with possession with intent to distribute a controlled substance (21 U.S.C. §§ 841(a)(1) and (b)(1)(B)). [ROA.6];[2] *see* 21 U.S.C. §§ 841(a)(1), (b)(1)(B).

On November 16, 2017, Mr. Purifoy entered his plea of guilty before the district court to the sole count as set forth in the information. [ROA.69]. On February 21, 2018, Mr. Purifoy was sentenced by the district court a term of incarceration for 240 months. [ROA.99]. Mr. Purifoy filed timely notice of appeal on March 11, 2018. [ROA.40].

B. Statement of the Facts

On November 8, 2018, Appellant was charged by information with possession with intent to distribute a controlled substance.

On November 16, 2017, Mr. Purifoy entered his plea of guilty before the district court to the sole count as set forth in the information. [ROA.69]. On February 21, 2018, Mr. Purifoy was

[2]On November 16, 2018, Mr. Purifoy agreed to waive indictment. [ROA.22].

sentenced by the district court a term of incarceration for 240 months. [ROA.99].

At that sentencing hearing, the district court adopted the offense computations set forth in the PSR and Addenda. [ROA.83]. Those computations resulted in a base offense level of 36, as Mr. Purifoy was found responsible for the equivalent of 32,921.6 kilograms of marijuana. [ROA.151]; *See* U.S.S.G. §2D1.1(c)(2).

There were also three guideline enhancements. Two levels were added due to Mr. Purifoy's role in the offense as a manager or leader. [ROA.121]; *See* U.S.S.G. §3B1.1(c). Two level were added because the offense involved methamphetamine which was imported from Mexico. [ROA.120]; *See* U.S.S.G. §2D1.1(b)(5). Two level were added because Mr. Purifoy maintained a premises for the purpose of manufacturing or distributing a controlled substance. [ROA.120]; *see* U.S.S.G. §2D1.1(b)(12). All three of these guideline enhancements were supported by the record and the law applicable to the computations. The resulting adjusted offense level of 42 was correctly calculated, [ROA.151]; three levels were then subtracted based on Mr. Purifoy's acceptance of responsibility for the offense. [ROA.121, 151]; *See* U.S.S.G. §§ 3E1.1(a), (b). His total offense level

was correctly calculated to be 39. [ROA.151].

Mr. Purifoy's prior felony convictions and the fact that the instant offense was committed while on parole resulted in 13 criminal history points, which established a criminal history category of VI. [ROA.149]; *See* U.S.S.G. Ch. 5, Pt. A. Mr. Purifoy's offense level of 39 indexed with a criminal history category of VI resulted in a guideline range of 360 months to life. [ROA.152]. However, the statutory maximum sentence for the offense of conviction is 240 months, thus, 240 is the maximum sentence which the district court could impose. [ROA.152]; *See* U.S.S.G. §5G1.1(a). Notable however, here the government filed a motion for downward departure based on Mr. Purifoy's substantial assistance. [ROA.84].

At sentencing, the government presented the testimony of Samuel Dendy, a Special Agent with the Texas Department of Public Safety working as a task force officer with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). [ROA.85]. Agent Dendy testified to the substantial assistance provided by Mr. Purifoy, including introducing undercover officers to persons engaged in narcotics trafficking, and making undercover buys of methamphetamine in as much as pound quantities. [ROA.89].

Based on the evidence presented by the government, the district court made a finding that Mr. Purifoy had provided substantial assistance to the government. [ROA.91]. The district court continued, stating that "I think he would be eligible for a departure if the court were otherwise to conclude it would be appropriate." [ROA.93].

The district court ultimately denied any departure downward notwithstanding Mr. Purifoy's substantial assistance to the government. [ROA.22]. The district court apparently considered other factors outside of the record, articulating a belief that Mr. Purifoy had committed other criminal acts for which he was not charged. In pronouncing the sentence, the district stated:

> The government has given you a generous benefit by charging you with an offense level that would only cause you to be sentenced to 240 months instead of a potential of a life sentence. I think it's more than generously rewarded you for whatever assistance you provided to the government, so I'm not going to depart below the bottom of the advisory guideline range of 240 months.
>
> I think that is probably a little low, considering your true offense conduct, so that's the sentence I'm going to impose, a sentence of imprisonment of 240 months.

[ROA.99].[3]

Mr. Purifoy was sentenced accordingly, with the district court setting the term of imprisonment to be served consecutive to any terms of imprisonment he might receive from pending state charges. [ROA.99].

C. The Appeal

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, contending that the district court had considered matters outside the record in denying any downward departure even though the government had filed its 5K1.1 motion in response to Mr. Purifoy's substantial assistance. The court of appeals summarily rejected this claim, holding that it did not have jurisdiction to review the denial of a downward departure unless that denial was based on the district court's mistaken belief that it lacked the authority to depart. *See Purifoy,* 788 Fed. Appx. at 291[4] (citing *United States v. Lucas*, 516 F.3d 316, 350-51 (5th Cir. 2008) and *United States v. Alaniz*, 726 F.3d 586, 627 (5th Cir. 2013)).

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[3] The district court initially broached this "undercharge" theory in an Order issued on February 27, 2019. [ROA.31].

[4] Included as "Appendix A."

REASON FOR GRANTING THE PETITION

The opinion of the Fifth Circuit demonstrates the circuit split regarding whether courts of appeal have the jurisdiction to review the denial of a downward departure, as at least one other courts of appeal does hold that the advisory nature of the guidelines and interpreting case law provides authority for an appellate court to review such denials. *See United States v. Anonymous Defendant*, 629 F.3d 68, 74 (1st Cir. 2010) (" ... all sentences imposed under the advisory guidelines [with an exception not applicable here] are open to reasonableness review, including those that entail either a discretionary refusal to depart or a departure whose extent is contested."); *see also United States v. Cancel-Zapata*, 642 Fed. Appx. 4, 6 (1st Cir. 2016) (unpublished) (reviewing the reasonableness of the sentence where the district court partially denied downward departure grounded in the a government 5K1.1 motion); *United States v. Pérez–Crespo*, 557 Fed. Appx. 6, 7 n. 1 (1st Cir.2014) (unpublished) (reviewing sentence for reasonableness where district court denied downward departure) (*citing United States v. Booker*, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

The Fifth Circuit below, and in the past, has held that it does not have jurisdiction to review the district court's denial of a downward departure under 5K1.1. *See Purifoy*, 788 Fed. Appx. at 291 *(citing Lucas*, 516 F.3d at 350-51, *and Alaniz*, 726 F.3d at 627).

Other circuit courts of appeal hold similarly. *See e.g., United States v. Jackson*, 467 F.3d 834, 839 (3d Cir.2006) ("[A]s it was pre-Booker, courts of appeals post-Booker, have no authority to review discretionary denials of departure motions in calculating sentencing ranges."); *see also United States v. King*, 604 F.3d 125, 141 n.9 (3d Cir. 2010) (jurisdiction lacking to review denial of downward departure under § 5K1.1 unless sentencing court "was unaware of its discretion to grant the motion. " (citation omitted)).

However, it is not clear how or where these courts have located such a jurisdictional limiting construct in this post-Booker environment.

One court has noted that "Although the scheme of downward and upward departures [has been] essentially replaced by the requirement that judges impose a reasonable sentence, this court treats such so-called departures as an exercise of post-Booker discretion to sentence a defendant outside of the applicable

guidelines range." *United States v. Martinez-Escobar*, 201 Fed. Appx. 467 (9th Cir. 2006) (unpublished) (*quoting United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir.2006)).

The various courts of appeal are eminently qualified to assess the reasonableness of a district court's sentence under *Booker*. *See e.g.,United States v. Smith*, 440 F.3d 704, 706 (5th Cir.2006) ("Under [*Booker*], we ultimately review a sentence for "unreasonableness." Though flexible, the reasonableness standard is not unbounded. Both a district court's post-Booker sentencing discretion and the reasonableness inquiry on appeal must be guided by the sentencing considerations set forth in 18 U.S.C. § 3553(a)").

Since such is the case, it is difficult to substantiate the rationale used by the courts which cull the denial of a downward departure cases from the other cases where the sentence will receive a reasonableness review on appeal.

This Court should therefore grant *certiorari* to address the circuit split identified above and to clarify the law surrounding this frequently-occurring sentencing issue.

CONCLUSION

Petitioner respectfully prays that this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, he prays for such relief as to which he may be justly entitled.

Respectfully submitted this 1st day of April, 2020.

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